

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

76-4147

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-4147

AAACON AUTO TRANSPORT, INC.
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE INTERSTATE COMMERCE COMMISSION

PETITIONER'S OPENING BRIEF

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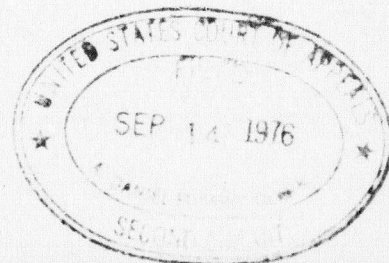


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IN THE UNITED STATES COURT OF APPEALS
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INTERSTATE COMMERCE COMMISSION)	<u>PETITIONER'S OPENING BRIEF</u>
and UNITED STATES OF AMERICA)	
)	
Respondents.)	

STATEMENT OF ISSUES PRESENTED

This petition seeks review of an order of the Interstate Commerce Commission, Division 1, reported as AAACon Auto Transport, Inc. - Investigation and Revocation of Certificate 124 M.C.C. 493 (No. MC-C-7287, Div. 1, 1976) (R.A., p. 1793); and gives rise to the following issues:

A. Does the interpretation of petitioner's certificate in the order under review involve a departure from a prior norm, and is that departure set forth clearly in the order under review so that a reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate? Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade 412 U.S. 800, 808 (1973).

B. Is the order under review supported by and in accordance with the reliable, probative and substantial evidence? 5 U.S.C. §556(d).

C. Has the order under review been issued on consideration of the whole record or those parts thereof cited by petitioner? 5 U.S.C. §556(d). Does the order under review include a statement of findings and conclusions,

and the reasons or basis therefor, on all the material issues of fact, law and discretion presented on the record. 5 U.S.C. §557(c)(A).

STATEMENT OF THE CASE

I. Nature of the case.

This is an action to enjoin an order of the Interstate Commerce Commission in three I.C.C. dockets, No. MC-C-7287, No. MC-C-7287 (Sub No. 1), and No. FF-359, requiring petitioner, AAACon Auto Transport, Inc. ("AAACon"), to cease and desist from allegedly unlawful carrier practices and operations in exercise of Commission power under §204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c), declining to grant AAACon the declaratory relief of an interpretation of its certificate under §554(e) of the Administrative Procedure Act, 5 U.S.C. §554(e), and denying the application of AAACon's affiliate, Auto Trip USA, Inc. ("Auto Trip") for a freight forwarder permit. (R.A., pp. 1812-1813). This Court has jurisdiction under 28 U.S.C. §§2321 and 2342. Venue lies in this Court under 28 U.S.C. 2345 because both AAACon (R.A., p. 48) and Auto Trip (R.A., p. 1794) have their principal place of business in New York, N.Y.

This case is related to an enforcement proceeding which the Commission brought against AAACon in the U.S. District Court for the Southern District of New York, which was reviewed on appeal by this Court in Interstate Commerce Commission v. AAACon Drivers Exchange, Inc. et al. 340 F.2d 820 (2 Cir., 1965) cert. denied, 381 U.S. 911 (1965). However, the present review proceeding has not previously been before this Court.

II. Course of the proceedings.

AAACon received its common carrier certificate from the Commission in

1965.^{1/} In order to handle increased business, AAACon in 1968 applied to the Commission in Docket MC-125808 (Sub No. 2) for a motor carrier certificate authorizing movement of automobiles with an immediately prior or subsequent movement by freight forwarder (R.A., p. 5), and AAACon's affiliate, Auto Trip (R.A., p. 49) applied for a permit authorizing the freight forwarding of motor vehicles (R.A., p. 1794). In 1970, the Commission granted Auto Trip's freight forwarder and AAACon's supplementary motor carrier application.^{2/} In March of 1971 the Commission instituted an investigation of the lawfulness of AAACon's operations in Docket MC-C-7287 (R.A., p. 1794), and in May of 1971 the Commission reopened the application proceedings to determine whether its prior approval should be reversed. (R.A., p. 459). In June of 1971 AAACon filed with the Commission its petition for a declaratory order seeking an interpretation of its certificate in Docket MC-C-7287 (Sub 1). (R.A., p. 461). Thereafter AAACon withdrew its supplementary motor carrier application in MC-C-125808 (Sub No. 2) because its file had been "red flagged,"^{3/} and the Commission proceeded to hearings on all of the other pending dockets.

^{1/} AAACon Drivers Exchange, Common Carrier Application, 102 I.C.C. 393 (MC-125808, Sub 1, Div. 1, 1966).

^{2/} Auto Trip USA., Inc., Freight Forwarder Application 337 I.C.C. 570 (FF-359, Div. 1, 1970), (R.A., p. 424).

^{3/} When the Commission instituted its investigation AAACon had pending before the Commission an application for permission to move automobiles to dealers, filed in part to obtain a Commission disclaimer of jurisdiction. (R.A., p. 103-107). At that time the Commission had the policy of "suspending" agency action on any application by the respondent in such an investigation pending before the Commission during the period of such investigation until conclusion of the investigation. The Commission has been instructed to abandon this "red flag" policy in North American Van Lines v. United States F. Supp. _____, 1976 Fed. Car. Cas. ¶82,614,82,615 (N.D., Ind., May 10, 1976). Cf. idem. 412 F.Supp. 782,795-799 (N.D., Ind., April 20, 1976). Nonetheless, because the policy obtained at the time the Commission instituted the investigation below, AAACon withdrew and did not pursue its pending motor carrier application, believing [correctly as events proved] that the Commission would do nothing with such an application until the Bureau of Enforcement's accusations of misfeasance against AAACon had been finally disposed of.

III. Disposition below.

A. In Docket MC-C-7287 (Sub No. 1), the order under review (R.A., p. 1793 et seq.) as supplemented by the initial decision (R.A., p. 1548 et seq.) denied AAACon's petition for interpretation of its certificate and in substance prohibited AAACon from transporting any motor vehicle to any consignee if AAACon had any reason to suspect that the consignee might have the purpose of selling the automobile subsequent to the transportation movement, or to any consignee who was habitually engaged in the business of selling automobiles, regardless of whether the particular automobile involved in the shipment was scheduled to become part of a resale transaction.

B. In Docket FF-359, the Commission denied Auto Trip's freight forwarder application on the ground that Auto Trip's affiliation with AAACon infected Auto Trip with AAAcon's lack of fitness. (ibid.)

C. In Docket MC-C-7287, the investigation proceeding, the order under review suggested that fundamental aspects of AAACon's modus operandi constituted practices which were unjust and unreasonable and required that AAACon cease and desist from them.

IV. Statement of facts relevant to the issues.

About 1950, AAACon began a brokerage service which brought together owners of private automobiles who wished their automobiles to be transported and individuals who wished to obtain inexpensive transportation by driving the automobiles of others. AAACon derived its income by advertising the availability of its brokerage service in major cities to both classes of customers, by bringing them together so that they could satisfy each other's needs, and by accepting a fee from the car owner for each transaction.

Since AAACon's service reduced the volume of traffic available to both passenger and freight carriers, they complained to the Commission which ruled, in an informal opinion, that AAACon's activities constituted common carriage requiring a certificate of public convenience and necessity from the Commission. AAACon and four competing companies immediately applied for the necessary certificates authorizing them to engage in so-called "driveaway service" in the transportation of private automobiles. The Commission determined^{1/} that AAACon's services did constitute common carriage requiring I.C.C. approval, but refused to issue certificates to AAACon and its competitors since other carriers already possessed authority to provide the service using professional drivers and that that service was not shown to be inadequate or unavailable. The Commission left open one possibility: that the business of arranging transportation by bona fide casual drivers would not require I.C.C. authorization. (77 M.C.C. at 372).

Taking advantage of this opening AAACon attempted to change its solicitation policies for both drivers and car owners to eliminate any holding out of responsibility to provide a transportation service so as to limit AAACon's function solely to that of a broker who brings casual drivers and car owners together to their mutual benefit. Nevertheless the Commission contended that AAACon was continuing to engage in common carriage and brought action to enjoin its continuance. The district court denied an injunction in Interstate Commerce Commission v. AAA Con Drivers Exchange, Inc. et al. 234 F. Supp. 66 (S.D., N.Y., 1964); but this court reversed, 340 F.2d 820 (2 Cir., 1965), cert. denied 381 U.S. 911 (1965).

1/ AA Auto Delivery, Inc., Common Carrier Application, 77 M.C.C. 365 (MC-116023, Div. 1, 1958).

Although this Court found that AAACon's services were unlawful absent I.C.C. authority, Judge Friendly's opinion encouraged AAACon to seek the necessary certificate, 340 F.2d at 826, n.2:

"We are unable to share AAA Con's fears that an application for a certificate is sure to be denied, presumably on the ground that its unlawful operations show it not to be 'fit.' The Commission has not regarded such operations as a bar if these were conducted in a not unreasonable belief as to their legality -- a test rather clearly satisfied when they have passed muster in the reasoned view of a district judge."

AAACon applied for authority which the Commission granted, quoting and following the above language.^{1/}

AAACon's present round of difficulties with the Commission stems from 125 complaints from the public against AAACon received by the Commission during part of 1969, 1970 and 1971 (a period apparently in excess of 30 months). (R.A., p. 394a). During this time AAACon transported 20,000 automobiles per year, or a total of approximately 50,000 shipments (R.A., p. 1094). Thus, only one quarter of one percent (0.25%) of AAACon's customers made any complaint to the Commission. This accorded with AAACon's own experience because in 1971 AAACon received patron complaints of any nature including loss and damage claims concerning only 587 out of the 20,000 automobiles transported that year, a 2.9% complaint rate. (R.A., p. 1904). The record also shows only 1.3% of customer claims against AAACon remained unsettled more than three months after they had been filed (R.A., p. 1096).

The second branch of the Commission's case against AAACon consists of 15 bills of lading reflecting shipment which, according to the Commission,

^{1/} AAACon Drivers Exchange, Common Carrier Application, 102 M.C.C. 393,397 (No. MC-125808, Sub 1, Div. 1, 1966).

AAACon lacked authority to handle because its certificate prohibited delivery of automobiles to dealers. Three of these movements were from an automobile lessee who was returning the vehicles to the lessor at the termination of the lease. Two movements were destined to automobile finance companies. Nine movements were consigned to AAACon's Los Angeles agent. AAACon justifiably relied on advice from the Commission's Staff that these movements were authorized by its certificate, providing AAACon took no part in further transportation from the consignee to an automobile dealer. The last shipment was a repossessed automobile delivered for a finance company in care of the guarantor of a recourse financing agreement. AAACon believed that this shipment was authorized by its certificate, but to avoid the appearance of impropriety it had instructed its employees not to accept such shipments. The employee who accepted this shipment was fired as soon as AAACon learned of the transaction and prior to any Commission investigation. The employee was fired not for causing AAACon to violate its certificate, but because the employee violated AAACon's policy of avoiding even the appearance of unauthorized transportation.

ARGUMENT

The order under review and the initial decision in Docket MC-C-7287 whose findings of facts it incorporates (R.A., pp. 1793 et seq., 1548 et seq.) devote some 69 pages of the record to an elaborate vilification of AAACon. This recital is characterized by both righteous rhetoric and an appearance of scrupulous documentation. These characteristics in combination generate a fairly frightful indictment of a common carrier which tends to make quite difficult the task of evenhanded judicial review. A tribunal reading a report of such charges as the Commission has leveled against AAACon in the order under review is not unlike a jury hearing evidence of a crime of sexual assault; the crime alleged is so heinous that the disposition becomes natural to view the accused as somehow guilty to some degree. Otherwise the prosecution could not possibly have been brought.

As a practical matter the factual conclusions of the order under review almost all demonstrably err. By this petitioners do not mean that the Commission drew conclusions from the evidence about which reasonable men might differ or that the record on review supports both the Commission's interpretation and another interpretation favoring AAACon's interest. Instead AAACon means that the conclusions of the Commission in all material respects cannot withstand scrutiny and that the findings of fact on which they are based lack even a rudimentary evidentiary foundation.

The reckless sweep with which the Commission has declared AAACon anathema makes it impossible in any reasonable compass to brief every error of the order under review. Some attempt must be made to order priorities and focus on the grossest aspect of error below. This becomes possible when one assesses the three operative functions which are served by the order under

review: (a) it finds AAACon guilty of unlawful practices and orders them discontinued; (b) it finds AAACon guilty of rendering service in unlicensed sectors of the market and orders such alleged departures from AAACon's certificate stopped; and (c) it refuses to grant AAACon or Auto Trip any further enlargement of market or extension of certification because, in view of the first two conclusions, AAACon's management is found so unwilling to comply with Commission regulation as to be "unfit" to receive any further Commission licenses to engage in regulated transportation activity. The order under review can best be assessed in terms of this conclusory findings of "unfitness," and of the two legs on which it stands, namely improper operating practices and unlawful marketing. The Commission's factual premise for the former is customer claims for 23 shipments, and for the latter 15 bills of lading allegedly constituting unlawful consignments to "dealers."

I. The evidence on AAACon's claims practices does not show it is unfit.

- A. The initial decision, which the Commission adopted, contains clear mistakes on vital facts.

The Commission's order adopted the Administrative Law Judge's statement of facts as "completely accurate in all material respects." 124 M.C.C. at 503. (R.A., p. 1803). Therefore, material errors in the initial decision infect the Commission's final order.

The initial decision found that AAACon's policy was "to avoid actual arbitration of disputes or claims against it." AAACon's purpose in invoking arbitration, according to the initial decision, was to discourage shippers from filing or pursuing claims (R.A., pp. 1551-1552), and to obtain stays against litigation brought by shippers. (R.A., p. 1552). As evidence for this conclusion the Administrative Law Judge noted that AAACon's Executive

Vice President, Mr. Zola, was unable on the witness stand to estimate the number of claims arbitrated or cite specific examples of arbitration.

Ibid. The conclusions, and the factual predicates, are incorrect.

Mr. Zola actually testified about two specific cases -- the Teafatiller and Cahan cases -- which did go to arbitration. (R.A., pp. 1535-1536). Mr. Zola and AAACon were not aware prior to his cross-examination that specific instances of actual arbitration would be in issue. (R.A., p. 1505j). See Morgan v. United States, 304 U.S., 1, 18-19 (1938); and Bowman Transportation Inc. v. Arkansas-Best Freight System Inc., 419 U.S. 281, 288 (1974). Also, AAACon's exceptions to the initial decision and verified motion to reopen the record listed 20 examples of claims actually arbitrated. (R.A., p. 1613). The incorrect finding that AAACon used arbitration merely as a subterfuge cannot stand as a basis for the Commission's conclusion that AAACon systematically endeavored to discourage claims.

The initial decision also declared that while AAACon "does maintain a policy of insurance in the amount of \$3 million . . . such policy has a deductible provision of \$1,000." The report added that most claims were for less than \$1,000 and therefore AAACon was motivated to deny claims regardless of their merit. The initial decision also found that AAACon generally advises a claimant to look to his own insurance company; and that there is evidence of record that AAACon's drivers were bonded. (R.A., p. 1555). All of these assertions are incorrect.

The insurance policies were introduced as Exhibits 170-173. (R.A., pp. 1849-1861). They insure AAACon for damage to cars being transported with no motion of a \$1,000 deductible. (R.A., p. 1854). Indeed the Commission earlier acknowledged there was no such deductible. (Exhibit 174, R.A., p. 1862).

We challenge the Commission to point to any deductible in these policies. Therefore AAACon's supposed motivation to discourage and deny claims did not exist. The first page of AAACon's driver's bond is in the record as Exhibit 176 (R.A., p. 1865). Rather than deny claims of shippers who had their own insurance AAACon accepted primary liability but advised the shipper to notify his insurance company in case of third-party claims. AAACon also sought where lawful to take advantage of the shipper's insurance, as permitted by §1(a) of the Uniform Bill of Lading prescribed by the Commission. See Exhibits 177-178 (R.A., pp. 1867-1869).

B. Even where AAACon erred, it demonstrated good faith.

The Commission held AAACon and its affiliate, Auto Trip, unfit to receive further operating authority, and issued a cease and desist order against AAACon, party based upon its characterization of AAACon's claims practices. The Commission's specific accusations were that AAACon:

- (1) ". . . discourage[s] the filing of claims wherever possible . . ." 124 M.C.C. at 504 (R.A., p. 1804).
- (2) Denies claims "with little or no investigation into the merits." Ibid.
- (3) Exhibits a "lack of concern, bordering on almost total indifference, for the interests of its customers." Ibid.
- (4) ". . . in advising claimants to retain the final \$50 of the freight charges without conducting an investigation . . . grant[ed] rebates to such shippers." 124 M.C.C. at 505 (R.A., p. 1805).
- (5) Used an arbitration agreement in the bill of lading to discourage shippers from filing or pursuing claims. 124 M.C.C. at 506 (R.A., p. 1806).

AAACon accepts, as it must, this Court's recent decision invalidating

the arbitration clause in its former bills of lading which required arbitration at the demand of either shipper or carrier and specified New York City as the situs. Re AAACon Auto Transport, Inc. and State Farm Automobile Insurance Co. ____ F.2d ____, 1976 Fed. Car. Cas. ¶82,618 (2 Cir., June 9, 1976). However, AAACon's good faith belief in the validity of this clause is supported by numerous earlier judicial rulings acknowledged in this Court's opinion which upheld and enforced the clause. See, e.g., AAACon Auto Transport Inc. v. Teafatiller 344 F. Supp. 1042, 1044 (S.D., N.Y., 1971) and AAACon Auto Transport, Inc. v. Jacobson, 475 F.2d 1394 (3 Cir., 1973). Therefore this accusation does not uphold the Commission's conclusion of unfitness since the arbitration clause was relied on "in a not unreasonable belief as to . . . [its] legality - a test rather clearly satisfied when . . . [it has] passed muster in the reasoned view of a district judge." Interstate Commerce Commission v. AAA Con Drivers Exchange, Inc., et al., supra, 340 F.2d at 826, n.2 (2 Cir., 1965) See also R.A., pp. 1609-1612.

The Commission accused AAACon of granting rebates to shippers by allowing them to retain the final \$50 of freight charges as settlement of claims. This practice was incorporated into AAACon's bill of lading which was filed with the Commission as part of AAACon's tariffs. As the term is used in §222(c) of the Interstate Commerce Act, 49 U.S.C. §322(c) and in §1 of the Elkins Act, 49 U.S.C. §41(3), a rebate is a concession by a carrier to a shipper contrary to the provisions of its filed tariffs. In any event, as soon as the Commission advised that this practice might be considered a rebate, AAACon immediately discontinued it in 1971. This so-called rebate practice is not sufficient to justify the Commission in finding in 1976 that AAACon or its affiliate, Auto Trip, is or for the future will be unable or unwilling to comply with the requirements of law. 49 U.S.C. §307(a).

The remaining Commission allegations as to AAACon's lack of interest, discouraging of claims, and denial of claims without investigation are premised on testimony about 23 claims presented at the hearing. The initial decision (R.A., pp. 1564-1594) summarized these cases as though AAACon had not even appeared at the hearing, ignoring completely testimony on its behalf. It is not possible within the confines of this Court's limitations on the length of briefs to discuss all 23 cases. However the Commission's final order discussed only four of these cases and presumably relied particularly on them. (R.A., p. 1805). To these we now turn.

C. The four claims relied upon by the Commission do not support its conclusions.

1. The Rust Claim.

The order under review sums up the Rust claim as follows:

"The record indicates that when one of AAACon's shippers was involved in a civil lawsuit in North Carolina due to the action of the driver selected by respondent, AAACon filed an affidavit in which it averred that the driver of the automobile was an independent contractor. AAACon admitted, however, in a letter to its insurance company dated September 21, 1970, that it is liable for the actions of its driver even though he is labelled an independent contractor. AAACon's action in this instance is typical evidence of its efforts to avoid its responsibilities as a common carrier under the act." (R.A., p. 1805).

There is no substantial evidence that AAACon avoided any "responsibility" to Mr. Rust. An automobile which AAACon was transporting for him (R.A., pp. 768-777), became involved in a highway accident as a result of which delivery of the car was delayed for two and a half months (R.A., pp. 788-789), and Mr. Rust incurred repair costs of \$1,200. (R.A., pp. 790-792). Without any question the transportation mission was a failure AAACon was in breach of the contract of carriage, and Mr. Rust had a valid claim. Mr Rust filed that

claim on August 27, 1970 (within nine months of the time of expected delivery, as required by the bill of lading contract) in the form of a letter which recited, "the damages from this accident have been repaired by my insurance agency," and which requested payment from AAACon of \$103.14 because he had "paid this amount toward the auto repair bill." (R.A., p. 1831a). AAACon promptly paid the claim. (R.A., p. 793). Months afterwards persons injured in the accident sued Mr. Rust, AAACon, and the insurers of both defendants. The issue in this suit was not damages suffered by AAACon's patron as a result of the failure of AAACon's transportation mission, but liability to a third party who of course was not a party to the contract of carriage and to whom AAACon owed no duty as a common carrier (R.A., pp. 794-796). This suit in North Carolina resulted in a judgment of \$10,500 against Mr. Rust and in the amount of \$21,000 against AAACon (R.A., p. 1671), and the judgments were paid by AAACon's insurer and by Mr. Rust's insurer without expense to Mr. Rust or to AAACon. (R.A., p. 1660). In other words this motor vehicle accident suit was concluded as such litigation is usually concluded, by the insurance carriers involved.

AAACon and all other driveaway carriers are in an assigned insurance risk pool because their enterprise is "more hazardous than the ordinary kind of risk," and it creates risks which insurance companies "can't cope with from the underwriting standpoint as they can in the normal type situation." (R.A., pp. 1526-1527). Consequently AAACon has an arms-length relationship with the Home Insurance Company, AAACon's third party liability insurer involved in the handling of the Rust claim. AAACon must expect any insurer handling AAACon's account as an assigned risk to rely and insist on the most literal interpretation of the insurer's contract of insurance with AAACon.

That contract requires AAACon to allow its insurer to manage any third party claim litigation brought against AAACon. (R.A., pp. 1504-1505a). In exercise of rights which it claimed under the contract of insurance with AAACon, Home Insurance Company has attempted to insist in the past that an officer of AAACon supply Home Insurance with an affidavit to be used in third party liability litigation to the effect that AAACon was not responsible for the actions of its drivers. AAACon's Executive Vice President testified:

" . . . I refused to sign that affidavit, although . . . Mr. Allen of the Home Insurance Company called me up and stated that they were going to withdraw their defense of the action [an action prior to the North Carolina action against Rust] unless I did exactly as I was told, and I felt that if I stated that, it would be a misstatement of what I understood the law to be and I contacted Mr. Seymour Alpert of the Interstate Motor Carriers Agency, which is our insurance agent, and he is an attorney as well and deals exclusively in the areas of carrier insurance, and he suggested that I better put on the record for my protection and the protection of our company, our position, which was that although the driver may be an independent contractor and not an employee of our company for Workmen's Compensation purposes, that AAACon is responsible for any action that he does and any damages resulting from the transportation of a vehicle that he undertakes on our behalf." (R.A., pp. 1263-1264).

Consequently AAACon wrote Home Insurance Company in September 1970, explicitly declining to include any advice in an affidavit that AAACon was "not responsible for the driver's acts," going on to say

"Evidence of insurance has been filed by the Home with the Interstate Commerce Commission. Both AAACon Auto Transport, Inc. as a common carrier and the Home by virtue of its filing has a responsibility for the acts of AAACon's drivers whether the latter being deemed independent contractors or employees. To state otherwise is contrary to the undertakings implicit in the filing of the Home Insurance Co. with the Interstate Commerce Commission and the obligations of AAACon as a common carrier. As you may be aware, we have tried to assist the Home in minimizing claims every way permitted by law. However, we cannot put in an affidavit of fact, a statement of law which runs counter to our obligations as defined by the Interstate Commerce Act." (R.A., pp. 1905b-1905c).

This is hardly the "admission" which the order under review described, supra. Rather it is an admonition by AAACon to its insurer, months in advance of the making of the affidavit, that AAACon would not go along with any attempts to deny liability for the acts of its casual drivers. AAACon's insurance agent testified that this letter was dispatched to AAACon's insurer and further advised that AAACon pays insurance premiums for liability insurance on the assumption that AAACon as the insured is "fully responsible as far as the public is concerned." The size of AAACon's premium payments is based purely and solely on ". . . the number of contractors that work for them . . ." (R.A., p. 1523).

Subsequent to this exchange of correspondence, Home Insurance Company drafted and gave to AAACon's Executive Vice President for signature a form of affidavit (R.A., pp. 1832-1833) which may have been filed in behalf of AAACon's insurer in the North Carolina third party litigation against Mr. Rust and AAACon (R.A., pp. 826-827). This recites that AAACon "assists people who wish to move their own cars," brings car owners and potential car drivers together, does not pay the drivers a fee and does not "inspect the vehicle, examine the contents and assure delivery on any specified date." All of those statements were true. Attached to the affidavit was the form of "bill of lading agreement" and "freight bill order form" which AAACon customarily used with its patrons. The affidavit did not contain any representation that AAACon was not responsible for harm caused by its drivers, because, as noted above, AAACon had previously declined to include such assertions in affidavits which Home Insurance requested AAACon to file.

The order under review recited in this connection that "AAACon filed an affidavit in which it averred that the driver of the automobile was

an independent contractor." This action, said the Commission, "is typical evidence of [AAACon's] efforts to avoid its responsibilities as a common carrier under the Act." There are three things clearly, irretrievably and squarely wrong with this finding: (1) AAACon's affidavit did not deny liability for the driver's actions or the automobile damage in any respect; (2) AAACon in the past had as a practice refused to deny liability for the action of its drivers as independent contractors or otherwise, and (3) AAACon's "responsibilities as a common carrier under the Act" had nothing to do with the defense by AAACon's insurer in a law suit brought against AAACon by a third party who was not a party to the contract of carriage.^{1/} Although the Commission's opinion made no reference to it, a fourth point was pertinent: (4) AAACon had no control whatsoever over defenses urged by AAACon's insurer in the third party liability law suit, because AAACon's contract of insurance with its insurer deprived AAACon of any such functions, and AAACon had no choice about the terms of that contract because AAACon (along with all other driveaway carriers) is in an assigned insurance risk pool.

2. The Levy-Petzall claim.

This second example of assertion by AAACon of an "invalid" claim defense arose out of a shipment from St. Louis, Missouri, to Quantico, Virginia which aborted when the automobile collided with another vehicle in Aiken, South Carolina. (R.A., pp. 509d-510). Litigation resulted and concerning it the Commission found:

^{1/} The issue of the driver's status as employee vs. independent contractor was initially raised not by AAACon or even its insurer, but by Mr. Rust who erroneously alleged that the Driver was not a casual driver but rather a professional employee of AAACon (R.A., pp. 775-776, 1498-1499). Later Mr. Rust contradicted this testimony by introducing the complaint which stated that the driver was an employee of AAACon's competitor, Auto Drive-away and by introducing the bill of lading agreement which stated the driver was not a regular employee of AAACon but was rather an "independent contractor."

"Again, in a letter dated February 25, 1970, AAACon advised a claimant that its insurance company did not intend to take any action; it failed, however, to advise the claimant that in any case it remained primarily liable." (R.A., p. 1805).

The letter referred to (R.A., p. 1905a) actually stated:

"As you know, we stand ready to transport the car upon completion of the repairs. We have notified the insurance company as to the facts concerning the third-party claims mentioned in your letter. I cannot speak on their behalf other than to tell you that it is my understanding that they are taking no action."

The language in the order under review would lead the reader to believe that AAACon had denied liability on a claim for damage to a car, that AAACon's insurance company likewise refused to acknowledge such liability, and that the shipper was left without recourse. The uncontested facts are dramatically to the contrary. Damage to the automobile in question amounted to about \$400-\$500 and the shipper admitted before the Commission^{1/} that AAACon offered to pay these damages in full. (R.A., pp. 513, 515). Furthermore, no delay whatsoever characterized AAACon's offer to pay the claim:

"Q. Did you make any offer to pay the claim for the cargo damage to the automobile which occurred as a result of the accident?

A. Yes, there was no question about that. We had informed Mr. Petzall and Mr. Levy that we stood ready to pay those repairs from the time that the accident occurred. There was no question about the fact that it was our responsibility.

Q. Was your offer accepted?

A. No sir." (R.A., pp. 1260-1261).

The reason why the claimant refused to accept AAACon's offer became clear when the claimant, John Levy, Jr. brought suit against AAACon in the

^{1/} The shipper, John Levy, Jr., was an officer in the Marine Corps, and testimony in his behalf was tendered by his attorney, Gerhard Petzall. (R.A., pp. 509a-509e).

courts of Missouri to recover not \$400 or \$500, but \$54,300. (R.A., pp. 513a, 1267). In other words, Mr. Levy brought a claims suit for more than 10 times the value of the vehicle alleged to have been damaged. AAACon's rational response was to invoke the arbitration clause of the bill of lading and to seek a court order barring both judgment and further litigational maneuvers or expense in the Missouri suit until Mr. Levy's claim had been arbitrated. The rationality of this response can be tested by the following concession made on the record below by Mr. Levy's attorney:

"Q. As far as you are concerned, as I understand it, when you discussed the matter with Ralph Zola, you indicated that the body damages which needed to be repaired were \$489?

A. That was the bill from -- I think it was Bill Vernon Chevrolet in Akron [Aiken?]. When the car was subsequently delivered and we had it collected over there with some additional things that had to be done in Quantico, I think the total came to \$505, give or take." (R.A., p. 513a).

After close of the record below AAACon tendered and the Commission refused to receive evidence that AAACon's suit to compel arbitration was successful and included even a mandate of this Court affirming the result on March 5, 1973. (R.A., pp. 1656-1658, 1661-1662, 1664-1665). In short there isn't a scintilla of evidence in the record under review that AAACon's handling of Mr. Levy's claim for damage to his vehicle involved the slightest mishandling, misrepresentation, or misfeasance. If Mr. Levy had chosen to use a railroad instead of AAACon to transport his automobile from St. Louis to Quantico, if the railroad had lost or totally destroyed Mr. Levy's vehicle, and if Mr. Levy had thereupon brought suit against the railroad for \$50,000, it would be hard to imagine the language in which the Commission could have couched an accusation that the railroad was guilty of failing to use "every effort" to meet its "obligation to provide a responsive service" (R.A., p. 1804) when

the railroad offered to pay the actual damages incurred, refused to pay the \$50,000 claimed, and failed to persuade the railroad's insurer to pay the \$50,000 claimed.

The Levy case is complicated by a collateral line of litigation to which it gave raise, namely a suit brought against Mr. Levy, AAACon, and AAACon's insurer (Home Insurance Company) in South Carolina by a third party injured in the collision of the Levy car with another vehicle. The defendants' exposure in this South Carolina litigation "was under a thousand dollars." (R.A., p. 1267).^{1/} AAACon was defended in this litigation by its insurer, Home Insurance Company, and the defense was successful and the complaint against AAACon was dismissed. (R.A., pp. 1260-1264). Quite obviously, therefore, it made no difference whether AAACon's letter of February 25, 1970 (cited by the order under review in R.A., p. 1805) reported that AAACon's insurance company would or would not assume primary liability; the fact was that neither AAACon nor its insurer had any liability respecting the accident according to the final judgment entered in the litigation.^{2/} At the outset of this South Carolina litigation, the plaintiff, to assure that he was not suing a judgment proof creditor, attached the defendant's (Levy's) vehicle in apparent accordance with customary provisions of South Carolina law. Levy

^{1/} Apparently responsibility for the collision of Levy's car and the other vehicle must in some measure be shared by Levy's (AAACon) driver and the other driver, because "both of the cars involved in the accident were cited by the police." (R.A., p. 1258).

^{2/} The law happens to be that AAACon's insurer was only secondarily liable to third party claimants and Levy's insurer was primarily liable. U.S. v. Auto Driveaway 464 F.2d 1380 (7 Cir., 1972), Great Lakes Transit Corporation v. Interstate Steamship Company 301 U.S. 646 (1936). Therefore even if the point had been material, the treatment in the order under review would have erred.

requested AAACon to satisfy the lien of this attachment but AAACon could not do so because AAACon's insurance contract forbade AAACon to do so without Home Insurance's consent, and Home Insurance declined to give that consent. (R.A., pp. 1258-1262, 1904-1905, 1521-1527). AAACon was willing to pay a \$400 to \$500 claim for damage to the car; the expense of a \$30 bond premium to lift this lien clearly did not motivate AAACon to deny Mr. Levy's request. (R.A., p. 514). Nor was even the financing of this cost any bar to Mr. Levy's reacquisition of his vehicle because (contrary to testimony from a Bureau witness below that Mr. Levy "paid the premium in order to secure any damage that might arise" [R.A., pp. 512-512a] which was at the least mistaken and at worst perjury), Mr. Levy's insurer, the Fireman's Fund, had written that it "agreed to pay the premium on a bond to release this attachment as per . . . our contract of insurance." (R.A., p. 1628).^{1/}

Under the Uniform Bill of Lading, which AAACon has used in the past and which the Commission prescribes as the sole form of contract which AAACon may use in the future, neither AAACon nor its insurance company was liable to Mr. Levy for loss or delay of his vehicle due to a court attachment, because Section 1(b) of the Uniform Bill of Lading explicitly prescribes:

"No carrier . . . of any of the property herein described shall be liable for any loss thereof . . . or delay caused by . . . the authority of law . . ."

^{1/} The Bureau's witness below did not disclose the existence of this communication which he had received at the time he testified. Mr Levy disclosed it only in the course of arbitrating his claim against AAACon; and when AAACon tendered it to the Commission as newly discovered evidence, the Commission declined to receive it, on the ground that the record had been closed. 124 M.C.C. at 502. (R.A., p. 1802).

3. The J. B. White claim.

The bill of lading which AAACon used at one time included the clause:

"Shipper guarantees the operating and mechanical operation of the herein-mentioned vehicle during transport, and assumes all responsibilities for damage and all liabilities arising therefrom. Regardless of cause, carrier shall not be liable for any damages or consequences from . . . any mechanical defect occurring during shipment . . ." (R.A., p. 1841).

However, in January of 1972 AAACon changed this language (R.A., pp. 961, 966-967). The hearing officer's initial decision erroneously reported the above language in Appendix B to his report as AAACon's bill of lading at the time of the hearing (March 21, 1972 - R.A., p. 922). After January of 1972 the AAACon bill of lading (R.A., pp. 1842, 995-996) changed this language to read:

". . . Shipper is responsible to tender the vehicle to carrier in good operating and mechanical condition. Shipper is solely responsible for all damages and liabilities arising from inherent mechanical operating vice or defect in the vehicle in the absence of carrier fault."

The reason for this change was to make plain AAACon's policy that AAACon undertook to pay no repair costs necessary to maintain vehicle mobility during the transportation movement unless the vehicle failure was caused by AAACon's driver but that, when AAACon caused the incident or accident which made the repair necessary, then AAACon accepted responsibility for the repair costs.

The initial decision includes acknowledgement neither of this distinction nor of the revised wording of its bill of lading in which AAACon sought to make the distinction plain. Instead the initial decision implies a blanket condemnation of any bill of lading clauses which relieved AAACon of any degree of responsibility for repairing mechanical defects in the vehicle being transported:

"The bill of lading agreement is, on its face, either grossly unfair to the shipper or, in the manner in which the provisions were enforced by the respondent, left the shipper in such a position that he had no recourse for alleged disputes for claims. . . . The bill of lading agreement . . . states that regardless of cause, carriers shall not be liable for any damages or consequences from or for any delay in delivery, any rental of substitute vehicle, any mechanical defect occurring during shipment, or any excess mileage." (R.A., p. 1553).

"The record clearly demonstrates that . . . denial [by AAACon] of a claim, again in almost every instance, is based on the arbitrary conclusion that the basis of the claim rests on a mechanical defect or payment to the driver on delivery . . ." (R.A., p. 1555).

"The respondent did not assume its liability as a common carrier of the 'full actual loss, damage, or injury' to property being transported by it. . . . In numerous . . . instances, claims were denied on the ground that the proximate cause of the incident giving rise to the claim was a mechanical defect of the car being transported." (R.A., p. 1558).

This becomes important because the cease and desist order framed in the initial decision and possibly (but not explicitly) adopted by the Division 1 order under review requires AAACon

"to cease and desist from [the] utilization of bills of lading which incorporate unreasonable provisions . . ." (R.A., p. 1810).

Thus it is possible that the order under review requires AAACon to pay for damage to or delay of cars en route when that damage is caused by a mechanical defect in the car which becomes apparent during transit regardless of cause and which must be repaired during transit. Possibly the order under review is meant to require AAACon to bear the cost of such repairs en route. If so, it exceeds the statutory limit on a carrier's liability to damage "caused by it" or by a connecting carrier. 49 U.S.C. §20(11).

AAACon's certificate limits it to the driveaway transportation of used automobiles, and AAACon may not transport new automobiles from manufacturers.

Therefore this potential exposure of AAACon to repair costs of used automobiles, coupled with AAACon's duty as a common carrier to transport automobiles for all patrons upon reasonable demand without preference or prejudice could transform AAACon from a common carrier into some sort of an interstate maintenance facility to whom automobile owners in the United States could tender their vehicles whenever the vehicle seemed in imminent need of major repair. Quite obviously AAACon's privilege to immunize itself from liability of this sort by inclusion in its bill of lading of the language quoted above from Exhibit 162 is an issue of first importance in this review proceeding.^{1/} As this Court said in Eastern Motor Express Co. v. A Maschmeijer Jr. Inc. 247 F.2d 826, 828 (2 Cir., 1957):

"Under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made at least as against latent unfitness."

These prefatory observations have been necessary because the Commission's third specific citation of alleged AAACon misbehavior stems from AAACon's refusal to pay for the mechanical repairs necessitated by the breakdown of a car. AAACon contracted to transport Miss Jean White's Volkswagen from Los Angeles, California to Baltimore, Maryland. The vehicle became inoperable at a point near Reno, Nevada; AAACon could not proceed with further transportation until the vehicle was repaired. Miss White refused to authorize the repairs and instead demanded that AAACon pay for them. AAACon refused to comply with this demand. Miss White persisted in her refusal to pay any repair costs, and, in this impasse, the transportation movement was frustrated.

^{1/} The Commission has issued, entered or uttered no regulation whatsoever addressed to any of AAACon's competitors requiring them thus to expose themselves to liability for en route repair costs.

Eventually, rather than pay for its repair, Miss White sold the vehicle while it was en route. While he has used different and more judgmental words to characterize them, the hearing officer's account of Miss White's claim (Initial decision, R.A., pp. 1567-1568) fully supports the foregoing statement of objective facts.

The order under review sums these facts up by saying:

"In handling the J. B. White claim, AAACon addressed to the claimant a letter dated January 2, 1970, in which it stated that it did not authorize the repairs to claimant's car and advised claimant to pay for them so that the car could be moved. It is clear, however, that claimant authorized no repairs and that they were authorized, although perhaps inadvertently, by the casual driver selected by AAACon to perform the contracted movement and that as principal it [AAACon] was responsible for the actions of its agent." (R.A., p. 1805).

If a carrier is liable only for damages "caused by it," 49 U.S.C. §20(11), AAACon's mechanical defect clause in its bill of lading (R.A., p. 1842) quoted above is valid and a permissible bill of lading "practice" for a common carrier to adopt. AAACon was not only fully justified in denying Miss White's claim for repair costs, but was also prohibited from paying the claim, because such payment would be a violation of and departure from the requirements of AAACon's bill of lading, and thus would have constituted a preference to Miss White over other AAACon shippers prohibited by §216(d) of the Interstate Commerce Act, 49 U.S.C. §316(d), when reads in pertinent part:

"It shall be unlawful for any common carrier by motor vehicle . . . to give . . . any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever . . . "

Subissues colored the dispute below between the Bureau and AAACon concerning Miss White's claim and blurred the question to be decided:

1. Miss White contended that the vehicle had been driven 1,700 miles out of route between Los Angeles, California and Reno, Nevada, prior to its breakdown (R.A., pp. 523a-523b, 1816-1817b), and AAACon's driver (whom AAACon was able to find and present on the witness stand due to the fact that he was an applicant for appointment to the Police Department of Nassau County, New York -- R.A., p. 1830) testified that he was required to detour during the latter half of December when the movement occurred:

"Q. Will you tell us the route that you took and how you were travelling?

A. I went north. We were going to take the northern route home across Montana because we'd taken the southern route on the way over. So we proceeded north, went north through California and got to Northern California. We stopped for gas. We were talking to the proprietor of the gas station. He says that there was some heavy snow falls east of there and said it would be best for us to go back down and take Route 66 over which we did proceed back down through California, through Death Valley Junction and we were heading over to Las Vegas taking Route 66 when I heard the noise in the engine." (R.A., pp. 568-569).

Neither the initial decision nor the order under review finds this route circuitry unjustified in the circumstances and, indeed, the order under review might have been justified in the finding that the change in route executed by AAACon's driver was prudent and a responsible discharge of AAACon's common carrier obligation.

2. Miss White's hearsay testimony was admitted that "the Sunland Volkswagen told me the car was badly abused, that the engine was completely burned up, that it had been driven not very skillfully and not very carefully, to put it mildly." (R.A., p. 523c). Thus she appeared to accuse the young driver either of incompetence or of gross negligence. The driver supplied as credentials the facts that he was an honorably discharged Navy veteran, had been employed for some time as a yard mechanic and driver for Avis Rent-A-Car,

was a candidate for patrolman on the Nassau County Police Department, had driven a truck, and possessed a special New York chauffeur's license permitting him to drive vehicles over 18,000 pounds. (R.A., p. 565). On direct examination he said, "I drove the car normally." (R.A., p. 575), and on cross examination he said, "I drove the car according to the speed limit. I wasn't in no hurry. I was taking a lot of pictures." (R.A., p. 576b). He had driven Volkswagens before (R.A., p. 576a), and was aware that a Volkswagen is air cooled and is therefore not vulnerable to loss of coolant in hot weather. (R.A., p. 576c). Both the initial decision and the order under review declined to find that AAACon's driver had abused Miss White's car in any way.

3. After the vehicle breakdown, AAACon's driver notified Miss White's father by telephone and was instructed to have the vehicle towed to a garage in Las Vegas, Nevada and there to obtain an estimate of repair costs, and to report them to Miss White. (R.A., pp. 569-572). He relayed these instructions to the garage man, was requested to sign an authorization for the estimate, and signed a garage form in blank which specified neither repairs nor the identification of any vehicle. (R.A., pp. 570-573, 576d-576e). AAACon introduced unrebutted expert testimony that it is normal for a garage to require a signature on such a form before performing the work of inspection and analysis is necessary to supply an estimate of the cost of repairs. (R.A., pp. 1514-1515). The same expert testified that it occurs with some regularity that a Volkswagen after three to four years of wear requires engine replacement. (R.A., pp. 1513-1514). None of this testimony was considered or even mentioned in the elaborate statement of facts in the initial decision nor in the Commission's opinion which adopted that statement of facts.

In point of fact, the garage man violated what AAACon's driver testified were the verbal instructions given him, replaced the vehicle's engine, and refused to surrender it until repair costs of \$429 had been paid. (R.A., p. 571). It is on this testimony that the finding of the order under review is based:

"that claimant authorized no repairs and that they were authorized, although perhaps inadvertently, by the casual driver selected by AAACon to perform the contracted movement . . . " (R.A., p. 1805).

The practical, undebated fact in the record is that Miss White had only one of two choices, either sell the car or repair it, for it could never be any use to her again until it was rendered moveable. She eventually sold the car, but premised her claim on the proposition that she desired the other option, namely to have the use of it and to have it delivered in Baltimore. She never denied nor is there the slightest doubt that AAACon was willing to transport it to Baltimore as soon as it became operative. Her only dispute with AAACon concerned: (1) whether AAACon was liable for the repair costs; and (2) if AAACon was not liable for reasonable repair costs, whether AAACon caused her to incur excessive repair costs. Both the Carmack Amendment and AAACon's bill of lading settled the first question. AAACon had no basis on which to treat its bill of lading as void at the time her claim was filed and, as noted above, was prohibited by law from granting her a preference by treating it as void. As to the second issue, whether AAACon caused her to incur excessive repair costs, the unrebutted testimony is from AAACon's officer:

"Q. Did you indicate at any time to Miss White or her attorney that you would assume responsibility for any excess charge if the repair charge was greater than that which would be made by some other company for the same job?

- A Yes, it seemed that the sole issue that had developed in trying to get this car retransported was the fact that the engine burned out, and we explained to Mrs. White and to her attorney that the car was unmoveable without a new engine. I don't think anybody disputed that. So that the only question was whether or not she [could] have effected a cheaper engine replacement than the one that was done. We, if she could do it, if she could give us any evidence that another Volkswagen dealer or responsible repair place would do it, we would pay that difference.
- Q. If she had made any such claim against you and you had paid it, would she have been out of pocket any amount as a result of the action of the driver?
- A. She would have been out of pocket nothing more than she would have been had she authorized the repair herself.
- Q. Did you indicate to Miss White whether or not you would transport her automobile to the ultimate destination when the vehicle was ready?
- A. By telephone and letter over and over. We tried to get this point across to her, but we could not get her cooperation." (R.A., pp. 1276-1277).

The order under review makes much of the fact that repairs unauthorized by the shipper were made of the vehicle. This truth does not solve the problem. If the Las Vegas garage man acted contrary to instructions and withheld possession of her vehicle from Miss White contrary to the law, he was the proper respondent to her claim and not AAACon, and AAACon was fully justified in denying it. If AAACon's driver authorized the repairs to be made (nothing but self serving, speculative, and completely hearsay testimony from Miss White supported that conclusion) and testified falsely on the Commission's witness stand at a time when he was a candidate for appointment to a police force, then the question arises, what is the proper measure of damage for which AAACon is liable? Inasmuch as Miss White desired the vehicle delivered to her and therefore had to have the repairs made, AAACon's rational response to the claim was to offer to pay whatever repair costs Miss White could allege were excessive. Nowhere does either the hearing officer or Division 2 acknowledge,

comment on or evaluate this fundamental aspect of AAACon's response of Miss White's claim. Miss White's experience was cited in the order under review as an example of AAACon's use of "a means of discouraging a claimant from seeking relief." (R.A., p. 1805). The "relative merits of" Miss White's "particular claim, or its specific resolution is of no significance to our investigation," said the Commission. (R.A., p. 1803). The issue is whether "AAACon has in the past conducted itself in such a way as to discourage the filing of damage claims and has otherwise sought to avoid its responsibilities . . ." (R.A., pp. 1803-1804). The facts of Miss White's case show AAACon as meeting its responsibilities squarely and not avoiding them.

4. The Wolfe claim.

When AAACon heard Mr. Dellon E. Coker from the Regulatory Law Office of the Office of the Judge Advocate General of the Department of the Army enter his appearance below in behalf of the Department of Defense in opposition to AAACon (R.A., p. 594n), the question immediately surfaced in the minds of AAACon's anxious management, "what could we have done to incur the wrath of the largest and most powerful department of the United States Government?" The answer was swift to come when Brigadier General William R. Wolfe, Chief of Staff of the Alaska Command of the Department of Defense took the witness stand (R.A., p. 594o) and went on to explain that AAACon had failed to deliver in Seattle, Washington an automobile he had tendered to AAACon at Washington, D.C. and which he planned eventually to ship from Seattle to Alaska.

General Wolfe's vehicle, like Miss White's vehicle, failed en route. General Wolfe's Ford was six years old, a 1964 automobile with a bluebook market value at the time of the transportation movement of less than \$300.

(R.A., pp. 1368-1369). The vehicle's failure resulted from overheating and, according to the garage man who inspected it immediately after it became inoperable, a possible cause of this overheating was leakage of the coolant (in South Dakota in the wintertime) coupled with a thermostat failure. (R.A., p. 1925). The uncontradicted testimony of AAACon's driver was:

"The trip was uneventful until I entered South Dakota by way of U.S. Interstate Route 90, at which point I noticed that the engine temperature was rising. I pulled the car into a garage and I was advised by the mechanic that the radiator was freezing at the bottom. In order to protect the vehicle, I added anti-freeze to it at my own cost and expense. Thereafter I travelled approximately 120 miles, and just outside of Wall, South Dakota, I stopped the car again due to the fact that the temperature gauge indicated that the temperature was rising. I pulled the car over to the side of the road and got a ride to Wall, South Dakota. At the first gas station, I requested the station owner to bring the car in, which he did. He examined the vehicle and told me he could not repair it, so we arranged to have Cliff's Garage in Wall take the vehicle. Cliff's Garage looked at it and told me that apparently the antifreeze was insufficient, perhaps from a leak, and that he would contact William Wolfe about having the car repaired. . . . I never raced the car nor did I ever drive it when it was overheated." (R.A., pp. 1926-1927).

AAACon informed General Wolfe's representative that, once the car was repaired, AAACon would complete the transportation movement to Seattle. (R.A., pp. 594p-594q, 1360, 1930). General Wolfe declined to pay for the repairs necessary to render the vehicle operable on the ground that "the continued operation after mechanical difficulty caused the problem with the car and I didn't feel this was my responsibility." (R.A., pp. 594r-594s). Consequently the transportation movement aborted. Instead of paying the repair costs and rendering the vehicle operative, General Wolfe requested AAACon to purchase the vehicle from him. (R.A., pp. 594t-594u, 1370-1371).

The order under review describes this contretemps:

"Again, in handling the Wolfe claim the extent of AAACon's 'investigation' appears to have been a telephone call." 124 M.C.C. at 505 (R.A., p. 1805).

This does not accord with the unrebutted evidence:

"Q. Mr. Zola, did you make an investigation to determine the facts about which you are testifying?

A. Yes sir.

Q. How did you do it?

A. We have telephoned and spoke to the driver on the telephone, and we spoke to the service garage where the car is, that's Cliff's Service, to Mr. Cliff Szarkowski, the owner thereof.

. . .

Q. In addition to securing the information from the service station, did you undertake with an investigation to get information from the driver?

A. Yes sir.

Q. Did you speak to the driver on the telephone?

A. We did at the time of the occurrence and subsequent thereto.

. . .

Q. Did you investigate this in an effort to determine whether or not notification was given to any representative of the shipper, who at that time was, I understand it, was in Alaska?

A. Yes sir.

. . .

Q. With respect to your investigation, what did you find concerning notification to the agent or representative of the shipper?

A. We had notified the person who General Wolfe had all along been using to contact us, that is to say, Colonel Herbert, and we also notified our Seattle office, which notified the Seattle Army agents that were receiving the vehicle for General Wolfe, and they contacted General Wolfe, we know that because he corresponded with us based upon information which we had sent to him." (R.A., pp. 1357-1360).

The record also documents that AAACon obtained written estimates of

repair and the cause of the breakdown from experts (R.A., p. 1925) and a written report from the driver (R.A., pp. 1926-1927).

General Wolfe's claim amounts to nothing more than Miss White's claim with a twist, namely that the mechanical defect clause of AAACon's bill of lading should be given no effect and AAACon should pay the cost of repairs to vehicles which become inoperable en route, or that AAACon should buy the car from General Wolfe at six times its book value. This fundamental nature of the dispute persists even though a number of collateral issues were raised in the record below, for example whether AAACon's driver abused the automobile, whether AAACon dispatched it from origin sufficiently promptly after receiving the shipping order, and whether AAACon notified General Wolfe promptly enough once the vehicle became inoperable. The evidence quoted above indicates that any question of car abuse was the the very least sufficient arguable to justify AAACon in declining any claim.^{1/} AAACon was delayed in dispatching the vehicle because of the difficulty in the wintertime of obtaining a casual driver of an automobile moving from Washington, D. C. to Seattle, Washington. (R.A., p. 1356). AAACon had difficulty in notifying General Wolfe because, as noted above, AAACon had no address for him in Alaska and had to reach him through his representatives in Washington, D. C. and in Seattle, Washington. (R.A., p. 1360). In any event, General Wolfe's claim was not for delay in dispatch or delay in receiving notification; instead his claim was for payment by AAACon of repair costs for this six-year old car which would render the vehicle operable and would permit its delivery in Seattle. Therefore this claim is no support for the proposition that AAACon had the general practice of raising invalid claim defenses and of preventing its patrons from filing claims.

^{1/} In point of fact, General Wolfe never did file a claim for monetary damages until after the nine month period for such a filing had expired, which is specified is the Uniform Bill of Lading. (R.A., pp. 1360-1361).

D. The sanctions imposed are unjustifiable.

The order under review undertakes to require AAACon to pay loss and damage claims filed by shippers in certain circumstances, saying:

"It is further ordered, That the respondent be, and it is hereby, notified and required to cease and desist from arbitrarily denying claims when the facts available to it are inconsistent with denial." (R.A., p. 1810).

As AAACon pointed out to the Commission, "facts" are frequently "available" which are "both inconsistent" and "consistent with denial of a claim." Claims handled by carrier traffic managers and claims adjudication by competent tribunals normally require the weighing of such conflicting facts, and almost always the denial of a claim occurs when there are "facts available" which are "inconsistent" with that denial, just as normally the grant of a claim normally occurs in spite of the "availability" of facts which are "inconsistent with that grant" A more rational form of prohibition would be one forbidding denial of a claim when "no facts available to AAACon are consistent with denial." Even though rational, such a prohibition would burden AAACon uniquely among all carriers subject to regulation, because nowhere has the Commission ever published a rule placing a carrier in summary jeopardy of forfeiture of his franchise in the event he should erroneously deny a claim.

Failure by a carrier to pay a valid claim prior to litigation constitutes no violation of the Interstate Commerce Act. Atlantic Coast Line v. Riverside Mills, 219 U.S. 186, 208 (1911). Unless a claim is filed in writing with the carrier within nine months of the time of the loss, it is unlawful for the carrier to play the claim. East Texas Motor Freight Lines v. United States, 239 F.2d 417, 418 (5 Cir., 1956). Even though the Commission recognized

this is Loss and Damage Claims 340 I.C.C. 515, 554-555 (Ex Parte No. 263, 1972), it failed to give this claim filing requirement any consideration when evaluating the first claim file listed in the initial decision, that concerning Leslie H. Browder, Jr. (R.A., p. 1564), where the un rebutted evidence of record was that Mr. Browder had never filed a claim in writing as required by the bill of lading contract. (R.A., pp. 497, 1256).

The order under review appears to prohibit AAACon from writing bills of lading contracts with its customers which take into account the particular nature of the driveway transportation business. The order under review does this by requiring AAACon to "cease and desist from utilization of bills of lading which incorporate . . . provisions which are at variance with those of the Uniform Bill of Lading . . ." (R.A., p. 1810). The Uniform Bill of Lading used by general commodity carriers contains no language, for example, allocating responsibility for repair of a car which suffers mechanical failure en route.

The order under review seems to forbid AAACon from attempting to obtain any benefit from insurance coverage which its patrons have obtained covering their vehicles (R.A., p. 1810), even though §2(c) of the Uniform Bill of Lading (variation from which the Commission also prohibited) entitles a common carrier to the benefit of the shipper's insurance. United States v. Auto Driveway Co. 464 F.2d 1380 (7 Cir., 1972); Great Lakes Transit Corporation v. Interstate Steamship Company 301 U.S. 646, 654-655 (1936). As the Commission itself acknowledged (R.A., p. 1805), waiver of a valid defense to a loss or damage claim by a carrier would be an illegal preference to the shipper. Now, under the order at issue, if AAACon waives the benefit of the shipper's insurance it may be guilty; if AAACon fails to waive the shipper's

insurance, it may be guilty. The Commission's order did not resolve or even consider this dilemma. The consequences for AAACon of any form of non-compliance include summary revocation of its operating certificate.

II. AAACon has not willfully transported automobiles beyond the scope of its operating authority.

A. The restriction against transportation of automobiles to dealers requires interpretation.

The order under review finds:

"That AAACon has transported vehicles beyond the scope of its authority in violation of the clear intent of the restriction contained in the involved certificate, and has thereby shown itself to have been operating in interstate or foreign commerce in an unlawful manner. . . . We believe that AAACon's and Auto Trip's contentions that the restriction is vague, ambiguous, or illegal is [sic] without merit; that the Administrative Law Judge properly found that the restriction is clear on its face and unambiguous, and, therefore, he properly denied the relief sought in AAACon's petition for declaratory order, as set forth in No. MC-C-7287 (Sub No. 1), and embraced herein, and the relief sought therein will be denied." (R.A., pp. 1807-1808).

Consequently, the cease and desist order is that AAACon "abstain from all . . . those operations in interstate or freight commerce, of the character found in said report to be unlawful." The form of the prohibition set forth in the cease and desist order recommended by the hearing officer was:

"It is further ordered, That the respondent be, and it is hereby, notified and required to cease and desist from the performance of any operation in interstate or foreign commerce found herein to be unlawful or unauthorized, specifically the transportation of autos moving to automobile dealers, and thereafter to abstain [sic] and refrain from the resumption of any such operation unless and until appropriate authority therefor is obtained." (R.A., p. 1811).

All of this was addressed to the restriction in AAACon's certificate "against the transportation of any traffic . . . moving to automobile dealers." (AAA Con Drivers Exchange, Common Carrier Application, supra, 102 M.C.C. at 402). Evidence on the basis of which the Commission originally granted this certificate included testimony from automobile lessors of the need for AAACon's service to transport autos from the lessees to the lessors at the conclusion of the lease or upon a default by the lessee requiring repossession; transportation of autos from a car owner to a financing company upon default of the owner in complying with the requirements of the financing contract; and the transportation of automobiles to auctioneers "who sell to dealers and to the public" in behalf of the shipper. (102 M.C.C. at 405-408). The testimony had included shipment of a "livery Cadillac to a dealer in California" for disposal upon the end of its usefulness to the livery company, and shipment of an automobile to a financing company such as the Connecticut National Bank, which then transferred the car to a dealer for disposal on the market. (R.A., pp. 1621-1624).

Space does not permit wholesale quotation from the opinion of the Commission granting AAACon's certificate to prove that the shipments at issue were properly authorized. The meaning of "dealers" was confused at the inception of the certificate. At that time the Commission accepted as a basis for defining the grant of authority to AAACon evidence of shipments to an auctioneer who sold cars to dealers and the public. This testimony, particularly shows the need for interpreting the restriction against "shipments to dealers." After the parties had stipulated to the restriction the hearing examiner first accepted the testimony, and then reversed his own ruling with the observation that it reflected shipments to dealers. AAACon Drivers Exchange, Common

Carrier Application, supra, 102 M.C.C. at 405 n.1. Significantly, the Commission reversed, reinstating the examiner's original ruling to admit the evidence, saying: "We find that the auctioneer is not a 'dealer' as that term is generally understood." 102 M.C.C. at 396. The examiner's summary of other testimony also shows that the types of shipments AAACon is now ordered to cease and desist from were originally considered not to be shipments to dealers. See particularly the supporting testimony of car and truck rental and leasing companies summarized at 102 M.C.C. 405-406; and underlying testimony reproduced as R.A., pp. 1621-1624.

AAACon therefore considered that its certificate did not preclude return of vehicles to lessors or to financing companies even when the consignee lessor or the consignee financing company had the purpose, after such return, to sell the car on the market. During the course of interviews by members of the Bureau of Enforcement with members of AAACon's management occurring after that investigation was instituted, AAACon became aware that a Bureau of Enforcement member had requested special access to AAACon records concerning what the Bureau's witness described as "deliveries to dealers which [were] in violation of the restriction in their [AAACon's] certificate." (Tr. 576). Upon reviewing these files it became apparent to AAACon's management that the Bureau interpreted the restriction in AAACon's certificate against movements to dealers differently from AAACon's understanding of it. Therefore AAACon filed its petition below for a declaratory order seeking an interpretation of AAACon's certificate to which the Commission assigned Docket No. MC-C-7287, Sub 1, and which the Commission consolidated for hearing with the Commission's investigation in the main docket. Jurisdiction to grant this declaratory relief is documented by 1 Davis, Administrative Treatise §4.10 (Supp. 1963); Atlantic Freight Line Inc. - Petition for Declaratory Order, 51 M.C.C. 175, 185

(MC-77477, Div. 5, 1949); Carolina-Virginia Courier, Inc. Ext.- Virginia Counties 95 M.C.C. 612 (MC-123486, Sub 1, 1964).

AAACon's petition stated that many persons and corporations engaged in automobile dealerships also dealt with automobiles for purposes other than the function of a dealership. For example, such persons and corporations serviced cars, leased them, and used them in the operation of their business. Therefore the declaratory petition asked whether the restriction against delivery to a "dealer" applied when:

- a. The movement was for the purpose of storing, repairing or servicing the vehicle, and the consignor retrieved the car from the consignee after such processing.
- b. The dealer consignee is the owner of the vehicle and the lessor, and the vehicle is being returned upon termination of the lease to a lessee; or the consignee is owner of the vehicle and a bailor and the cars being returned from a business bailee.
- c. The dealer consignee is receiving the car in the dealer's capacity as a freight forwarder, air freight forwarder, ocean freight forwarder, or non-vessel operating common carrier, and, after receipt, on-forwards the car to another consignee.
- d. The dealer is consignor as well as consignee and the movement is between two facilities of the dealer or from the dealer as principal to the premises of the dealer's agent.
- e. The consignee is affiliated with a dealer by a relationship of employment or stock ownership.
- f. The consignee dealer has a security interest in the vehicle.
- g. The consignee dealer has no purpose to treat the car as authorized in his dealer's license; for instance he has no purpose to include it in his inventory for resale.
- h. The carrier has no knowledge that the dealer consignee has purchased the car for inclusion in a sales inventory.
(R.A., pp. 464-468).

Of the 15 bill of lading files cited against AAACon by the Bureau below as evidence of unauthorized movements, at least five of them were addressed to situations within the scope of AAACon's petition for declaratory relief, viz.:

1. Three movements to Allen Paul Oldsmobile from Prewitt Semmes. Mr. Semmes, a former owner of Allen Paul Oldsmobile, had contracted with those who purposed his business for the free availability to him over a period of years of a new car annually of which he was to be the bailee, and Allen Paul Oldsmobile the bailor. The three movements in question were returns from Mr. Semmes to Allen Paul of such a vehicle at the conclusion of a year's bailment. The record lacked evidence of Allen Paul's purpose regarding disposition of these vehicles after their return, but the possibility, if not the probability, certainly existed that Allen Paul proposed to sell them. These AAACon had considered to be movements from a vehicle lessee to a vehicle lessor at termination of lease, and hence clearly within the scope of AAACon's original authority, which had been based on testimony by Olins Rent-A-Car, Discount Rent-A-Car, Alexander's Rent-A-Car, Inc., and Executive Equipment Corporation. (R.A., pp. 1977, 1979).

2. A bill of lading recording a movement from Burke Sales to "Ed Cox Motor Co." The memoranda introduced in evidence by the Bureau failed to record the fact of the transportation movement; the actual consignee was the Ford Motor Credit Company. (R.A., pp. 1978-1981). Thus this was a movement of a repossessed vehicle to a financing company, (held for redemption by its owner) with circumstantial indication that the financing company proposed subsequently to deliver the vehicle to Ed Cox Motor Company for resale,

if the owner did not redeem it as provided by Uniform Commercial Code §9-506.

3. A movement from Erellis Body Shop to Atlantic Pontiac where again the paper introduced by the Bureau failed accurately to record the consignee, who was the General Motors Acceptance Corporation. In this instance, however, the AAACon driver brought the automobile first to Atlantic Pontiac who inspected it in behalf of the consignee, and then delivered it to General Motors Acceptance Corp. (R.A., pp. 1981-1982, 2029).

B. The restriction against transportation of autos to dealers must be narrowly construed.

In the record below (R.A., pp. 1621-1628, 461-484), AAACon requested the Commission to rule as lawful and as permitted by any reasonable interpretation of the "dealer movement" restriction in AAACon's certificate any movement of a repossessed automobile to a financing company or any movement of a leased automobile at the term of its lease from the lessee to the lessor, even when a resale might follow such a movement, and even when the equipment lessor or the financing company requested delivery directly to a dealer, for the following reasons:

(1) The evidence on which the Commission issuance of AAACon's certificate was originally based included a significant number of such movements, and the Commission must look to the evidence of such movements when determining the scope of a disputed certificate. (R.A., pp. 474-477).

"The Commission argues that when Julia Bird received her certificate of authority in 1941 . . . no objection was made by her . . . as to the scope of the term 'groceries' as used in that certificate. That is true, but on those dates there was no reason why Mrs. Bird . . . should have known or even suspected that some department or group within the Commission had decided upon a greatly restricted meaning of the term 'groceries.' . . . It seems clear that the term 'groceries' was ambiguous. The definitions contended for by the parties to this lawsuit

demonstrate two widely differing viewpoints as to the proper meaning of the term. As an ambiguity did exist, Division 5 of the Commission was correct in giving consideration to testimony as to commodities which Bird was transporting in interstate commerce on June 1, 1935 . . . We hold that the [cease and desist] order of the full Commission is void for the reason that the Commission failed to give any consideration to the testimony hereinbefore described. Plaintiffs did not have a fair hearing. . . . This Court is without power to perform the functions of the Commission. However, it is our duty to declare that the order entered by the Commission on November 17, 1952 is erroneous and void because the Commission refused to give consideration to the evidence on this record of the scope of Bird's actual operations as of June 1, 1935 and thereafter." Bird Trucking Co. et al. v. United States, 11 Fed. Car. Cas. ¶82,028 (D., Wis., 1955).

Accord: Salvino v. United States, 119 F. Supp. 277 (D. Wash., 1954).

The Commission report under review makes reference neither to AAACon's citation of and reliance on evidence of shipments to financing companies and to vehicle lessors in AAACon's original certification case, nor to the existence or nature of any such evidence in that case.

(2) AAACon contended that the restriction in its certificate against movements to dealers should be interpreted as narrowly as possible (R.A., pp. 470-471) because it restricts AAACon's service "to particular shippers," a restriction which the Commission has found to be "inconsistent" with "common carrier status," and hence implicitly beyond the power of the Commission to impose.

"A motor carrier whose service is restricted or limited to particular shippers of the ordinary kind obviously would not be a common carrier. Applicants are . . . common carriers and are entitled to authority to continue operations as such. We are without power to restrict or limit their operations in a manner which would change their status from that of common carrier." Globe Cartage Co. Inc., Common Carrier Application, 42 M.C.C. 547, 549-550 (No. MC-3339, 1943).

The order under review contains neither acknowledgement of this issue nor resolution of the question of how the Commission can lawfully forbid

AAACon as a common carrier to serve financing companies and lessors of vehicles or any other class of consignees.

(3) AAACon requested that the restriction in its certificate be interpreted as narrowly as possible because as a matter of policy the Commission has decided that restrictions of this nature should never be included in certificates issued by the Commission to motor common carriers. (R.A., pp. 478-483). This policy determination was made in Fox-Smythe Transportation Co. Extension-Oklahoma, 106 M.C.C. 1 (No. MC-114284, Sub 29, 1967). In that proceeding an illustration of the type of certificate restriction thereafter prohibited was:

"A restriction limiting the destination area to be served 'to all present and future business locations' of two named consignees in Delaware was found to be unnecessarily restrictive and administratively undesirable and was modified to include all points in Delaware. No. MC-11950 (Sub No. 2), Wood Extension - Baltimore Md. (not printed), decided May 20, 1965," (106 M.C.C. at 13).

A further illustration of an undesirable restriction in Fox-Smythe was:

"Restriction to traffic moving to 'wholesale and retail news-dealers and agents' eliminated. Exhibitors Film Delivery & Service, Inc., Extension, 67 M.C.C. 613." (106 M.C.C. at 53).

The order under review makes no reference either to the Fox-Smythe case or the Commission policy underlying it and fails to acknowledge AAACon's contention in this regard.

(4) Finally in this respect AAACon requested the Commission (R.A., p. 477) to be guided in interpreting the restriction in AAACon's certificate by the policy determination it had made in Nationwide Auto Transporters, Inc., Transferee, 116 M.C.C. 8 (No. MC-F-72889, Div. 3, 1971)

that driveaway movements are today never used to transport automobiles from manufacturers to dealers.

"The transportation performed under present-day conditions pursuant to secondary automobile authority is for and on behalf of private owners of automobiles; or banks; for finance companies; for corporations moving their own as well as employees' cars, government vehicles and vehicles owned by service personnel. . . . In view of the facts in this particular case, we find applicants' arguments, which analyze driveaway service in the context of contemporary practices, highly persuasive. A public need has caused traditional driveaway services to evolve into a new type of service in the context of a changing regulatory scheme." (116 M.C.C. at 12-13).

None of these contentions were considered by the initial decision nor the Commission's final order.

C. AAACon has diligently attempted to comply with the restriction.

A movements from Houston, Texas to Streik Chevrolet in California was, out of the 15 files presented by the Bureau below, the only one both billed and delivered to a dealer as such. Concerning this movement, AAACon's Vice President testified:

"This order was taken and completed by an AAACon agent named Fred Habenicht who operated an office in Houston, Texas. It will be noted that this movement left Houston on or about February 24, 1969. The management of AAACon became aware of this movement in the middle of March, 1969, when it was reported in the ordinary course of business. An investigation was immediately initiated to determine the facts surrounding the movement and based upon information developed at that time, the management of AAACon determined that Habenicht had violated the express instructions contained in the rules and regulations of our company. He was, therefore, dismissed from the company in early April of 1969." (R.A., p. 1982).

This testimony is un rebutted, unimpeached, and reflects dismissal of this AAACon employee not only before introduction by the Bureau of evidence

below, but even before institution of the agency investigation under review. The AAACon management action takes on redoubled significance because AAACon's investigation of this movement (unprompted by any complaint from the Bureau of Enforcement or from the Commission) disclosed that "it was a repossessed automobile which was delivered for a finance company in care of the guarantor of a recourse financing agreement." (R.A., p. 1983). AAACon considered such a movement to be within the scope of those authorized by its certificate, but had, nonetheless, issued instructions to field officers (again unprompted by the Commission or the Commission's Bureau of Enforcement) to decline requests for service of such repossessed automobiles when the physical delivery was to be made to an automobile dealer. Mr. Habenicht's dismissal occurred not because he caused AAACon to violate its certificate (as AAACon's management understood that certificate), but because he violated AAACon management instructions issued to avoid even the possibility or the accusation of certificate violation.

D. AAACon reasonably relied on advice from the I.C.C.'s Staff.

The nine remaining shipments out of the 15 the Commission found constituted unauthorized transportation were all movements consigned to AAACon's agent in Los Angeles, California, Ernest Horton, whose enterprise was styled "All States Auto Delivery." (R.A., pp. 1983-1999, 577-583). The shippers consigned these nine cars to AAACon's agent, All States, with instructions that All States notify the owner of the automobile (normally a financing company) and receive instructions for handling it thereafter.

Mr. Horton and All States were not AAACon's exclusive agent; they acted also for four other carriers. (R.A., p. 1995). In addition to dispatching and receiving cars for AAACon, All States also stored automobiles,

repaired them, and dispatched them for other carriers in behalf of shippers other than AAACon's patrons. One of these other carriers was apparently Inter City Transport. All States along with many other AAACon agents (R.A., pp. 144-145) received compensation in terms of a commission percentage of revenue from the vehicles they helped to handle. (R.A., pp. 90, 1537-1538).

Aware that the transportation activity exemplified by these nine movements might give rise to questions under the terms of its certificate, AAACon in early 1970 (more than a year before institution of the investigation below) requested advice from the Commission's Section of Motor Carriers. AAACon asked whether transportation of an automobile to a destination AAACon agency, thereafter followed by movements of the automobile upon explicit instructions from the owner from AAACon's destination agency to another point, perhaps to the premises of a dealer, would in any way violate the strictures of AAACon's certificate, so long as AAACon had neither responsibility nor function respecting the movement from AAACon's destination agency to another point designated by the car owner. (R.A., pp. 1995-1997, 2033-2034). The advice which AAACon received from the Commission's Section of Motor Carriers under date of March 20, 1970 read in pertinent part:

"As for traffic delivered by you to banks or other financial institutions, there is no specific restriction covering such traffic. The report on your application for authority, 102 M.C.C. 393, mentions the transportation of repossessed cars for a bank in Bridgeport, Connecticut. Transportation of cars for a bank to the bank premises would seem to be within your authority. The fact that the bank later arranged for their delivery to a dealer, apart from your company, and pursuant to its financing arrangements, would not seem material.

"The second situation involves cars being moved for the account of a bank but brought not to the bank's premises but to a branch office of your company. The cars have been repossessed

or otherwise retaken by the bank which issues instructions to your company to bring the cars in to a branch office of your company. The cars are picked up from your branches by a third party sent by the bank. The third party has no connection with your company, and may be a representative of the bank, a purchaser, or another carrier. Eventually many of the cars go to dealers, but your company's connection with the transportation ends when the move performed for the bank is completed with the delivery to your branch office. In my informal opinion that move is not forbidden by the restriction against traffic moving to automobile dealers." (R.A., p. 2034, emphasis supplied).

In September of 1970, some five and a half months after having received the foregoing advice from the Commission's staff, AAACon's Executive Vice President in New York found it necessary to write Mr. Horton in California warning that, even though it may be lawful for Mr. Horton's organization, All States, to on-forward via other carriers automobiles previously received in AAACon's service, it was necessary that AAACon have no involvement, financial or otherwise, in such transactions. AAACon's Executive Vice President noted that it

"has further come to our attention that on occasion, for purposes of convenience, the subsequent carrier has submitted his bill for services through our company for collection from the (consignee) bank. This is to inform you that such practices are to cease forthwith. We are not a collection agency for other carriers, nor do we wish to give the impression of being so. Arrangements made by shippers for subsequent transportation should be paid for by the shippers and the subsequent carrier in the manner agreed to between them. It is not our concern and inasmuch as we do not participate in the revenues or operations of these carriers, we wish this practice eliminated immediately." (R.A., p. 2035).

The remaining nine shipments cited by the Bureau are all movements to All States Auto Delivery, AAACon's Los Angeles agent, and the Bureau's accusation was that AAACon had a direct or indirect interest in the carrier being used for a transportation movement from All States in Los Angeles to the premises of automobiles dealers. AAACon's management denied any such

relationship or interest under oath. The Bureau presented no direct evidence of such a relationship, but did introduce circumstantial evidence in the form of testimony that Mr. Horton has either destroyed records of the relationship between his organization and Inter City Transport, a carrier he stated he used for movements from the premises of All States to the premises of banks or dealers; or that he had lied to members of the Commission's Bureau of Enforcement concerning such records. (R.A., pp. 577-583). The Commission's Bureau of Enforcement never informed AAACon's management concerning the possibility of such deceit by Mr. Horton until the Bureau presented its evidence in the hearing room below.^{1/} The Bureau's investigator below developed evidence of possible deceit by checking bank records, but testified explicitly both that his only problem was with Mr. Horton in this regard and also that he did not advise AAACon's Executive Vice President (Ralph Zola) of this evidence.

"A. . . . There is no question about Mr. Zola being cooperative and actually stating that if Horton didn't square away he would also throw him out of the organization, so I have no qualms with the Zolas.

Q. Now, did you ever advise AAACon that you had found that Inter City -- The Inter City -- about the Inter City information you had found out at the bank?

A. No." (R.A., p. 581).

Consequently AAACon's management did not learn about the possibility of deceit until the hearing October 21, 1971. On November 1, 1971 AAACon discontinued its agency relationship with Mr. Horton and with All States

^{1/} AAACon makes no suggestion of Bureau had faith in this regard. Once the Bureau had come upon indications of deceit bordering on fraud by an AAACon agent, the Bureau was entitled to speculate that communications with other sectors of AAACon's enterprise would be similarly untrustworthy. Perhaps the Bureau saw no point in discussing the matter with AAACon's management prior to the time when the Bureau's counsel confronted AAACon's management with evidence of deceit in the investigatory hearing room.

Auto Delivery. (R.A., p. 1993). AAACon's explicit reason for doing so was that for the first time AAACon's management learned of the significant possibility that Mr. Horton's word could not be trusted. (R.A., pp. 1540-1546).

Thus this sector of the Bureau's case below raised two questions:

(1) Whether AAACon's management was lying and whether, through perjury on the witness stand, AAACon's headquarters officers attempted to disguise an unlawful relationship between AAACon and Inter City Transport, such that AAACon's movements of automobiles to AAACon's Los Angeles office, were really movements of automobiles to points beyond AAACon's Los Angeles office, namely the premises of automobile dealers.

(2) Whether the letter quoted above from the Commission's Section of Motor Carriers erred, i.e. whether AAACon's certificate prohibits AAACon from transporting automobiles to an AAACon destination office for subsequent transportation at the consignee's order via another carrier to premises other than AAACon's office.

The initial opinion by the hearing officer failed either to acknowledge or to resolve these issues, saying:

"A witness for the Bureau of Enforcement submitted an analysis of 15 shipments, the consignee in each of which was an automobile dealer." (R.A., p. 1595).

"The record is clear that the respondent did, in fact, move cars to automobile dealers in violation of its certificate despite the clear and unequivocal language of the certificate." (R.A., p. 1560).

The order under review is no less elliptic:

"Those movements cited by the Bureau which AAACon alleges involved the movement of repossessed vehicles to credit bureaus were

obviously to be sold as soon as possible by an auto dealer in order to minimize any loss. The intent of the restriction is clear, and these movements constituted a violation of the expressed [sic] limitation contained in its [AAACon's] operating certificate." (R.A., p. 1807).

Failure of the order under review to resolve these issues coupled with the sweeping findings that AAACon and Auto Trip are "unfit" do not square with AAACon's reasonable reliance upon the advice previously received from the Commission's Section of Motor Carriers that AAACon can lawfully transport automobiles to an AAACon destination agent. All of the foregoing evidence in the record on review is unrebutted. The order under review not only does not question this evidence; it does not even acknowledge its existence.

III. The Commission violated basic procedural standards in finding AAACon "unfit" to receive additional operating authority, refusing to interpret the present certificate, and imposing regulations and sanctions not borne by any competitors.

A. The Commission must explain its departure from prior norms.

An administrative agency must either abide by past articulations of its rules, or must acknowledge a departure from them and explain the reason for the departure. A recent statement of this principle is to be found in Atchison, T. & S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973):

"The agency may flatly repudiate [its] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate Congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve Congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule will not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." (Emphasis added)

Accord: Columbia Broadcasting System, Inc. v. F.C.C., 454 F. 2d 1018, 1026 (D.C. Cir., 1971); and Ringsby Truck Lines, Inc. v. United States, 263 F. Supp. 552, 554 (D. Colo., 1967).

The special importance of consistent agency application of clear standards in a proceeding involving carrier "fitness" is shown in North American Van Lines v. United States, *supra*, 412 F. Supp. at 792:

"Secondly, there is great potential for abuse where a criterion for receiving a public license is an applicant's willingness to obey the agency's directives.... [W]here the agency utilized investigation proceedings in lieu of the rulemaking process as a means of construing existing regulations, it would seem unjustified to characterize the company's participation in such declaratory proceedings as evidence of 'unfitness'."

It would be far more unseemly to punish as "unfit" a carrier whose only misstep was violation of rules which had not previously been formulated.

1. The Commission unlawfully found AAACon unfit for violating unpromulgated claims handling rules.

Until February 3, 1972, the Commission had never adopted rules governing the claims practices of regulated carriers other than household goods movers. All of the shipments relied upon by the Commission here to show AAACon's unfitness were transported prior to that date. In Rules, Regulations, and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (Ex Parte 263, 1972) the Commission adopted specific rules. 49 CFR Part 1005. Never has the Commission accused AAACon of violating these regulations after their adoption.

Before 1972, the only I.C.C. claims regulations applied exclusively to household goods movers and were adopted in Practices of Motor Common Carriers of Household Goods, 95 M.C.C. 138, 166 (Ex Parte MC-19, 1964) on findings that:

"During 1960, the Commission received complaints involving 1,272 loss and damage claims which accounted for almost one-half of all complaints received. For the same period, according to the Bureau's random study, 199,301 loss and damage claims were filed with the carriers indicating that 24.04 percent of the shipments transported produced claims. In 39,711 instances, no acknowledgment of receipt of the claims was made and in 19,814 instances acknowledgment was made but not within 30 days of the receipt of the claim by the carrier. The study further showed that in 11,275 instances, no offer of settlement or declination of the claim was made within 120 days after receipt thereof by the carrier."

Since these loss and damage complaints were less than half of all complaints received, at least 2,544 shippers complained to the Commission

about these carriers. There were about 829,000 shipments,^{1/} so three-tenths of one percent (0.3%) of all shippers of household goods filed complaints to the I.C.C. Only one-quarter of one percent (0.25%) of AAACon's shippers filed any complaint of any nature whatsoever with the Commission. Vide supra, p. 6. This performance is impressive considering that while both household goods movers and AAACon primarily serve the general public rather than sophisticated commercial shippers, the movers use professional employees while AAACon relies chiefly on casual drivers.

The Commission has never penalized any other carrier for its claims handling practices prior to the adoption of general rules in 1972. See Rosser & Fitch v. A.C.L.R.R. Co., 91 I.C.C. 611 (1924). In 1972 the Commission noted, 340 I.C.C. at 540: "We have previously exerted our authority in this confined area, although, admittedly, to a quite limited extent." By only imposing regulations for the future on the household goods carriers, whose record was and remains worse than AAACon's, while finding AAACon "unfit" and imposing sanctions, the Commission has ignored its prior practice.

2. The Commission departed from its invariable practice of looking behind the certificate where operations are challenged as unauthorized.

The Commission denied AAACon's petition for clarification of its certificate, and found AAACon unfit because it conducted "unauthorized" operations, despite the problems in interpreting the restriction against "shipments to dealers" discussed supra, pp.36-50. This was an inexplicable departure from the Commission's uniform prior practice. As the Commission itself stated in Bison Freight Lines v. Northwest Dispatch, Inc., 60 M.C.C.

^{1/} There were 199,301 claims, and claims constituted 24.04% of all shipments.
 $199,301 \div 0.2404 = 829,039$. $2,544 \text{ ICC complaints} \div 829,039 \text{ shipments} = 0.003$.

505, 506-507 (MC-F-4905, Div. 5, 1954):

"Our attention has not been directed to any proceeding in which the Commission has refused to make an examination of antecedent matters and has held that an operation complained of was not authorized, where it was contended that such examination, if made, would disclose the intent of the framers of the certificate to authorize the operation."

This passage was quoted, and the practice reaffirmed, in Leonard Bros. Transfer, Inc. - Petition for Clarification, 96 M.C.C. 246, 254 (MC-19227, Sub 44, 1964).

- B. The Commission's order lacks a substantial basis in the record and demands unnatural perfection from AAACon.

In discussing AAACon's supposed claim malpractices, the Commission declared that in dealing with shipper complaints AAACon must make "every effort" to meet lawful responsibilities. 124 M.C.C. at 504. (R.A., p. 1804) The meaning of this requirement was apparently foreshadowed by the decision by Commissioner Dale W. Hardin, then Vice Chairman of the Commission, to require a 100% compliance standard from AAACon. This decision was reached March 18, 1971, the date on which the investigation below was instituted (and therefore a date well before the Commission took any evidence in the investigation) when Vice Chairman Hardin in a memorandum to the Director of the Commission's Bureau of Enforcement instructed that "any violation" by AAACon was that any Commission order addressed to it be "totally complied with." This memorandum is appended to this brief as Appendix A because it is not included in the index of record which the Commission has filed with the Court.

The Commission has published no rule, regulation or statement of policy applicable to any competitor of AAACon establishing any such

compliance standard. No such standard has been made applicable to any of the driveway carriers who have been allowed to appear herein as intervenors in support of the Commission's order below.

This proceeding is conducted essentially under §204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c) providing for a Commission investigation "after notice and hearing." Whether considered as a rule-making or an adjudication, there is little room for doubt that a §204(c) proceeding can result in an enforceable order only if the order is "made on the record after opportunity for an agency hearing" within the meaning of §§553(c), and 554(a) of the Administrative Procedure Act, 5 U.S.C. §§553(c) and 554(a). Wong Yang Sung v. McGrath 339 U.S. 33 (1950); Cates v. Haderlein 342 U.S. 804 (1951); Riss & Co. v. United States 341 U.S. 904 (1951); Adams v. Whitmer 271 F. 2d 29 (9 Cir., 1958); Door v. Donaldson 195 F. 2d 774 (D.C. Cir., 1952). §204(c) is an inquiry to determine whether a carrier has violated the law and lays the basis for a §212(a) proceeding to revoke the carrier's certificate.

One would expect that the standard of compliance would be much more rigorous under §212(a) than under §204(c), because in the former type of proceeding the carrier has the benefit of an explicit Commission instruction in the form of a cease and desist order which establishes (or should establish) the exact parameters of activity within which the carrier is required to bring its operations. Aero Mayflower Transit Co. v. I.C.C. ____ F. Supp. ____, 1976 Fed. Car. Cas. ¶82,615 (N.D., Ind., May 10, 1976) was a court review of a Commission order under §212(a)

suspending a carrier's certificate for failure to comply with a prior cease and desist order which had been preceded by a §204(c) investigation. The record reflected an investigation by the Commission of 3,000 shipments for one of the respondent carriers (Aero Mayflower) and of 6,820 shipments respecting the other carrier (Allied Van Lines). In each case undoubted violations of the Commission's cease and desist order were demonstrated. However, the ratio of violations to total shipments in each case was less than 1%. The court refused to give effect to a Commission order penalizing carriers on the ground that they were not able to assure 100% compliance of their activities with the requirements of the Commission order. If that measure of grace is warranted in a §212(a) proceeding, a fortiori the same measure should bear in a §204(c) proceeding such as that below. Furthermore, if a Commission evaluation of several thousand shipments of respondent carriers in Aero Mayflower could not result in adequate support for a suspension order, it is hard to understand how Commission analysis of 23 out of more than 50,000 shipments can suffice in AAACon's case.

When an issue arises concerning the scope of market entry permitted by language in a carrier certificate, the question is one of rule making, and the Interstate Commerce Commission has the option of opening an ex parte rule making proceeding open to all affected parties for comment, or of developing the rule in the context of an ad hoc adjudication. In North American Van Lines v. United States, supra, 412 F. Supp. at 787 (N.D., Ind., April 20, 1976) a three-judge federal district court noted the practice of the Interstate Commerce Commission:

"to utilize adversary proceedings for the purpose of defining the meaning of certain carriage classifications

under which carriers such as NAVL operate. ...In lieu of rule making, the I.C.C. determines the issue by challenging the carrier in a declaratory proceeding. ...Counsel for the I.C.C. admitted that the purpose of [such enforcement investigations] is to construe the existing regulations, not to seek punishment of [the carrier.]"

The North American Van Lines court ruled that N.A.V.L.'s participation in such a "proceeding in lieu of the rule making process" cannot constitute unfitness, and that evidence of past carrier acts later shown to be outside the scope of the certificate warrants:

"...no inference of an unwillingness to conform to the rules and regulations of the Commission. The purpose of the declaratory proceeding is to determine what the rule shall be. It is unclear just how a carrier can be said to have violated a rule not yet determined, or how it could be deemed to be unwilling to obey lawful requirements at a time when the requirements had not yet taken shape."
(412 F. Supp. at 801).

The order under review includes the result of just such an adversary investigation used in lieu of rulemaking to interpret the restriction in AAACon's certificate against deliveries to dealers, and to evaluate the reasonableness of AAACon's practices concerning, for example, the use of arbitration clauses in bills of lading, the requirement that the shipper pay for repairs to vehicles disabled en route due to vehicle defect, and AAACon recourse to insurance coverage of the shipper vehicle in the event of a third-party claim. The order under review finds that AAACon has acted illegally, rules it unfit to receive future certificates from the I.C.C. and forbids it to engage in the future in any operation found in the order to be unlawful.

This entire structure of enforcement has as its foundation 23 claim

files out of 50,000 shipments transported in a period of 2 1/2 years, together with evidence of 15 additional shipments supposedly beyond the scope of AAACon's operating authority. AAACon has demonstrated that all but 1 of the 15 shipments were authorized by the language of its certificate as it was understood when issued, and the employee who accepted the remaining shipment in violation of AAACon's policy was promptly fired. Our close analysis of the 4 most important of the 23 claims in the record leads to the inevitable conclusion that the Commission failed to give any consideration whatsoever of AAACon's unrebutted evidence. Analysis of the remaining 19 claims would, if space permitted, justify the same conclusion.

C. The Commission's order ignores material evidence and issues.

The Commission, both in the Administrative Law Judge's initial decision and in its final opinion, hardly deigned to acknowledge the existence of evidence submitted by AAACon, much less rule upon it. Instances have been cited throughout this brief, but some major examples should be recapitulated.

1. The Commission's extensive discussions in the initial decision and final report of the claim of Miss White do not mention the testimony of the driver of Miss White's car, a candidate for the Nassau County police department. (R.A., p. 565). Neither his presence at the hearing nor the substance of his testimony were ever acknowledged by the I.C.C. Instead the Commission relied upon hearsay testimony about the cause of damage to Miss White's car. (R.A., p. 523c).

2. Similarly, the uncontradicted testimony of the driver

of General Wolfe's car (R.A., p. 923 et seq.) was treated as if it had never been.

3. The testimony of an automotive expert on behalf of AAACon (R.A., p. 1509 et seq.) as to the cause of damage in various claims was ignored.

4. The testimony of AAACon's insurance agent as to the scope of coverage and the handling of claims by the insurance company and AAACon was never dealt with. (R. A., p. 1521 et seq.)

5. The terms of AAACon's insurance policies, which were in the record (R.A., pp. 1849-1861), were not considered in the Commission's "findings" as to the extent of AAACon's insurance coverage.

6. Undisputed evidence as to the scope of operations which underlay the Commission's grant of authority to AAACon in 1966 was never discussed or considered. The Commission found that AAACon's certificate was not ambiguous, a finding which was clearly erroneous considering the problems the original hearing examiner had in deciding what evidence was material to the grant of AAACon's certificate in light of the stipulated restriction against "shipments to dealers."

The Commission's failure to consider AAACon's evidence was intimately connected with its failure to resolve crucial issues posed by AAACon in the record under review, among them:

A. What is the proper interpretation of the restriction in AAACon's certificate against transportation to dealers?

B. Does the Commission have the power to restrict or limit the particular shippers a common carrier may serve?

C. Were the insurance policies totalling \$3 million without any deductible adequate to meet AAACon's responsibilities to its shippers?

D. What is AAACon's responsibility for damage during transportation to shippers' vehicles caused by latent mechanical defects?

E. Did the "mechanical defect" clause of AAACon's former bill of lading do anything more than tell the shipper explicitly what was already implicit in §1(b) of the Uniform Bill of Lading prescribed by the Commission?

F. Was it reasonable for AAACon, prior to the issuance by the I.C.C. of applicable claim rules, to deny voluntary payment to shippers for the 23 claims in the record on the basis of facts available to AAACon but ignored or disregarded by the Commission?

G. The fifteen shipments which the Commission found constituted unauthorized transportation constituted less than 0.7% of the 2200 freight bills which AAACon tendered to the Commission for audit when its affiliate, Auto Trip, filed its freight forwarder application. The 23 claims at issue constitute about four hundredths of one percent (0.04%) of the 50,000 shipments transported in the relevant period. The Commission never contended that the 23 claims were at all representative of any other shipments AAACon transported or claims it handled. (R.A., pp. 549h, 549k). Was the Commission therefore justified in finding AAACon "unfit" when the record indicates that all of the actions the Commission complains of concerned far less than 1% of AAACon's business.

The error resulting from the Commission's failure to consider the available evidence and to rule upon the material issues is harmful both because it is the basis for denial to AAACon and Auto Trip of future market entry licenses, and because it amounts to a partial revocation of AAACon's certificate as it was understood when granted. Should AAACon violate any of the requirements of the resulting order of the Commission, whether inadvertently or otherwise, AAACon faces complete loss of its certificate. This jeopardy is emphasized by the terms of Commissioner Hardin's memorandum (Appendix A to this brief) that:

"[S]hould a cease and desist order be entered, I want the field personnel [of the I.C.C.] to make continued checks upon the operations of this carrier to assure that the mandate of that order is totally complied with and any violation of that order should result in further proceedings with a view to revocation of AAACon's certificate."
(Emphasis added)

In view of this attitude, the failure of the Commission in this proceeding to consider the whole record and resolve all material issues is especially grievous. Universal Camera Corp., v. N.L.R.B., 340 U.S. 474 (1951). This Court had occasion to quote the late Commissioner Aitchison of the Interstate Commerce Commission in Scenic Hudson Preservation Conference v. F.P.C., 354 F. 2d 608, 621 (2 Cir., 1965):

"The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible ..."

The Administrative Procedure Act requires consideration of the

entire record or those parts cited by petitioner, 5 U.S.C. §556(d); and a statement of findings and conclusions, and the reasons therefor, on all material issues presented. 5 U.S.C. 557(c)(A). The courts have long required the same. Atchison, T. & S.F. R. v. United States, 295 U.S. 193, 201 (1935). Florida v. United States, 282 U.S. 194, 215 (1931). Anglo-Canadian Shipping Co. v. F.M.C., 310 F. 2d 606, 617 (9 Cir., 1962). Williams v. Washington Metropolitan Area Transit Commission, 415 F. 2d 922, 937 (D. C. Cir., 1968).

The order under review is written as though AAACon had never introduced a syllable of testimony addressed to these questions of fact and issues of law. In short, this case is a glaring example of failure to include adequate findings in an administrative order and to resolve vital issues presented on the record.

CONCLUSION

For the foregoing reasons the order under review should be vacated.

Respectfully submitted,

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STATUTORY APPENDIX

Section 553(c) of the Administrative Procedure Act, 5 U.S.C.

§ 553 (c), provides:

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 554(e) of the Administrative Procedure Act, 5 U.S.C.

§ 554(e), provides:

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C.

§ 556(d), provides:

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed on rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 557(c) of the Administrative Procedure Act, 5 U.S.C.

§ 557(c), provides:

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

- (1) proposed findings and conclusions; or
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 2321 of the Judicial Code, 28 U.S.C. §2321, provides:

§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in the cases and proceedings under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43), run, be served and be returnable anywhere in the United States.

Section 2342 of the Judicial Code, 28 U.S.C. §2342, provides:

§ 2342. Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2221 of this title.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

Section 2343 of the Judicial Code, 28 U.S.C. §2343, provides:

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

Section 203(b)(9) of the Interstate Commerce Act, 49 U.S.C.

§ 303(b)(9), provides:

(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include

* * *

(9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit;

Section 204(c) of the Interstate Commerce Act, 49 U.S.C.

§304(c), provides:

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Section 212(a) of the Interstate Commerce Act, 49 U.S.C.

§312(a), provides:

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 410(c) of the Interstate Commerce Act, 49 U.S.C.

§ 1010(c), provides:

(c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. No such permit shall be issued to any common carrier subject to part I, II, or III of this Act; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to part I, II, or III of this Act, shall be denied because of the relationship between such corporation and such common carrier.

Section 9-506 of the Uniform Commercial Code provides:

Section 9—506. Debtor's Right to Redeem Collateral.

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9—504 or before the obligation has been discharged under Section 9—505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

APPENDIX A

OFFICE OF VICE CHAIRMAN HARDIN

No. MC-C-

AAACON AUTO TRANSPORT, INC. -- INVESTIGATION
AND REVOCATION OF CERTIFICATE

MAR 13 1971

MEMORANDUM TO DIRECTOR GOULD:

I have signed the memorandum of Philip M. Browning, Jr., Assistant Regional Counsel, thereby approving the institution of the investigation recommended therein. However, because of the seriousness with which I view the allegations therein, I wish to make these additional comments.

Firstly, for the reasons stated in your cover memorandum, I approve the "flagging" of the records of AAACon Auto Transport, Inc., for fitness purposes, in connection with this investigation proceeding. Secondly, if the allegations set forth in the Assistant Regional Counsel's memorandum are ultimately proven and a cease and desist order ultimately issued, any violation of that order should lead to revocation proceedings against this carrier. Therefore, should a cease and desist order be entered, I want the field personnel to make continued checks upon the operations of this carrier to assure that the mandate of that order is totally complied with and any violation of that order should result in further proceedings with a view toward revocation of AAACon's certificate.


HARDIN

CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the foregoing Brief and one copy of the Record Appendix in this action upon all parties of record.

Dated at New York, N. Y.
this 13th day of September, 1976.



Martin S. Snitow